No. 91-1006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

U.S. MARINE CORPORATION and
BAYLINER MARINE CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS
OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Amicus adopts the questions presented set forth in the Petition.*

* Although the Amicus believes that both questions presented raise important issues worthy of review by this Court, the focus of this brief will be on the rights of a successor employer to set its own initial terms and conditions of employment, which NAM believes to have been improperly infringed by the decision below.

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BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in a bal-

anced and proper interpretation of the principles of labor law that apply when the assets of one company are purchased to be used in the development of a new commercial enterprise.

NAM supports the Petition in this case because it presents an issue of substantial importance to NAM's members left open by this Court's decision in *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). The 6-5 decision below reflects a conflict among the circuits as to the right of a successor company to change its unionized predecessor's terms and conditions of employment, as long as such changes are annouced prior to the hiring of the predecessor's employees. The Seventh Circuit's enforcement of the order of the National Labor Relations Board here has the effect of retroactively abrogating the right of a successor employer to set its own terms of employment, a punitive result not contemplated by the National Labor Relations Act ("the Act"). Absent review and reversal by this Court, potential business investors will be deterred from providing needed capital to struggling enterprises due to the uncertainty over their ability to establish their own terms and conditions of employment.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH HOLDINGS OF OTHER CIRCUITS AS TO THE RIGHTS OF SUCCESSOR EMPLOYERS, A QUESTION OF SUBSTANTIAL IMPORTANCE.

In *NLRB v. Burns Int'l Security, Services, Inc.*, 406 U.S. 272 (1972), this Court held that a successor employer of a unionized facility was entitled unilaterally to change preexisting terms and conditions of employment without first bargaining with a union representing the predecessor's employers. The Court recognized that requiring any successor to adopt a predecessor's collective bargaining agreement, unless the successor chose to do so, would hamstring business purchasers generally by pro-

hibiting them from making changes needed to justify their capital investments.[1] The Court further held that, absent any preexisting relationship between the successor and the bargaining unit, there was no basis for imposing preexisting terms on the successor, under the settled principles of *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The *Burns* court did express the view that it would be "appropriate" for a successor to "consult" with a union in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit . . ." *Id.* at 294-95. However, in the years since *Burns* was decided, the National Labor Relations Board has interpreted the Court's holding to mean that a successor employer who intends to commence operations with a full complement of employees of its predecessor may still offer new terms and conditions of employment to those employees, so long as it does so prior to the employees' acceptance of the successor's employment. Thus, in *Spruce Up Corp. v. Fowler*, 209 NLRB 194 (1974), *enforced without opinion*, 529 F.2d 516 (4th Cir. 1975), the Board explained:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous workforce to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court.

The Second Circuit cited the *Spruce Up* decision with approval in *Brotherhood of Railways, etc. v. REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S.

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[1] As the Court stated: "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital . . ." 406 U.S. at 287-88.

1017 (1975), and reiterated that approval in both *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 881 (2d Cir. 1977) and *Saks & Co. v. NLRB*, 634 F.2d 681, 687 (2d Cir. 1980). The Ninth Circuit approved the Board's position in *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 678 (9th Cir. 1980). Similarly, the D.C. Circuit approved the position in *International Association of Machinists v. NLRB*, 595 F.2d 664, 674-75 (D.C. Cir. 1978).[2]

The decision of the court below conflicts with this substantial body of precedent by permitting the Board to impose preexisting terms of employment on a successor employer notwithstanding the successor's timely announcement of new terms prior to any offers of employment. Specifically, under the Seventh Circuit's holding and that of the Board, a successor is being forced to adopt preexisting terms of employment as a remedy for alleged unfair labor practices in the hiring of its employees. This retroactive mandate is being imposed upon the successor in this case even though the new employer never misled anyone about its intentions to hire its workforce under new terms and conditions of employment, in full compliance with *Spruce Up Corp.* and the cases cited above.

The Seventh Circuit's decision also conflicts with the decision of the Ninth Circuit in *Kallmann v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981), which concluded that an identical Board "remedial" order against a successor who engaged in discriminatory hiring practices was

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[2] Indeed, the sole situation in which the courts have found a successor to have had "perfectly clear" intent to hire the preexisting workforce under preexisting conditions has arisen when the Board found that the successor "misled" the employees by "tacit inference" into believing that they would be retained without changes in their conditions of employment. *NLRB v. Backrodt Chevrolet Co.*, 515 F.2d 512 (7th Cir.) (unpublished order), *cert. denied*, 423 U.S. 927 (1975); *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841 (6th Cir. 1976); *cert. denied*, 429 U.S. 1040; *see also Spruce Up Corp., supra*, 209 NLRB at 195.

actually an unlawful penalty.[3] The Ninth Circuit denied enforcement of the Board's order, noting that "the function of the remedy in unfair labor cases is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Id.* at 1103. In the present case, on the other hand, the court below rejected the Ninth Circuit's analysis in favor of upholding an admittedly "imprecise remedy" fashioned by the Board. (App. 38a).[4]

Thus, a conflict clearly exists between the majority decision below and the holdings of other courts of appeals. The Petition should be granted so that his conflict can be resolved.

II. THE DECISION BELOW HAS ERRONEOUSLY APPLIED THE NATIONAL LABOR RELATIONS ACT TO THE CIRCUMSTANCES OF THIS CASE.

In addition to presenting a conflict with other circuits on the successorship issue, this Court should review the decision of the court below because the Seventh Circuit has reached a manifestly improper result which misapplies *Burns* and the Act. As its stated justification for imposing preexisting conditions on the successor employer in the present case, the court below held that the successor somehow forfeited its right to set initial terms or to rely on the Board's *Spruce Up* holding:

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[3] It is well settled that the National Labor Relations Act is a remedial statute only and that the Board is not permitted to levy punitive orders against labor law violators. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-01 (1984); *NLRB v. Strong*, 393 U.S. 357 (1969).

[4] The resulting conflict has been accurately described by the five dissenting justices in the decision below: "If, as four other Courts of Appeal hold, U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to hire, then these terms establish the bench mark that the Board is entitled to restore." (App. 56a).

> In *Spruce Up*, there was a *legitimate* ambiguity as to whether the new employer would in fact be able to hire the predecessor's employees because the new terms were substantially different from those of the predecessor. The employer did not refuse unlawfully to hire its predecessor's employees in order to avoid having to recognize and bargain with the union. By contrast, U.S. Marine, *by its illegal activity*, has created any ambiguity as to whether all or nearly all Chrysler employees would have accepted positions. That ambiguity must be resolved against it.

(App. 35a) (emphasis in original).

The court of appeals has failed to make clear, however, why the type of unfair labor practice allegedly committed here should have altered the obligation of a successor under the principles set forth in *Burns* and *Spruce Up*. In *Burns* itself, for example, the Board found that the successor committed unfair labor practices in its treatment of the predecessor's employees.[5] However, while acknowledging the unfair labor practices, the Court in *Burns* nevertheless reversed the Board's finding that the successor was bound to maintain the terms and conditions of the predecessor's collective bargaining agreement. 406 U.S. at 292.

Here, on the other hand, the court below relied completely on the illegal activities of the successor to justify its holding, without citing any connection between those activities and the successor's prior announcement of new

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[5] Burns supplied the predecessor's employees with membership cards in another union and informed them that they must become members of that union in order to work for Burns. The successor also indicated that the employees would not receive uniforms unless they signed the cards and that Burns could not live with the existing contract between the predecessor and the union. Burns then recognized the second union on the theory that it obtained a card majority. The Board subsequently found that the employer's actions towards its predecessor's employees violated the Act, a finding not disputed before this Court. 406 U.S. at 275-6.

terms and conditions of employment. Even assuming that the successor did discriminate against the predecessor's employees in the hiring process, its logical goal in doing so would have been to avoid "successorship" status and its attendant bargaining obligation. The Petitioner did not need to engage in discriminatory conduct in order to set its own starting terms for the bargaining process, because it could have done so even if it had hired *all* of its predecessor's employees.

Thus, if the Board's true purpose were to deprive the Petitioner of the "benefit" of its discriminatory activities (App. 32a-33a), then a bargaining order would certainly have been a sufficient and appropriate remedy, as the avoidance of bargaining was the only unlawful "benefit" which the successor conceivably could have hoped to achieve. Imposing the additional penalty of depriving the successor of its preexisting right to announce new terms from which to start the bargaining process, however, is nowhere justified in the decision below.[6]

It is clear that the Petitioner announced new terms and conditions of employment before it hired any employees, and those were the terms and conditions from which any negotiations with a collective bargaining agent would have begun, regardless of Petitioner's other conduct. Petitioner certainly did not "mislead any employees into believing that they would all be retained without change in their wages, hours or conditions of

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[6] The dissenting judges correctly analyzed the situation as follows:

> The Board found that U.S. Marine discriminated against 34 of the 257 applicants. The remedy for this sin is to hire the 34; it is not remedial to augment the offer to the other workers or to give these 34 terms better then they would have had if U.S. Marine had hired them in 1984. Had U.S. Marine hired these 34 (rather, had it evaluated their applications without discrimination), the terms afforded all workers still would have been those U.S. Marine set, not those Chrysler set.

(App. 57a).

employment" (*Spruce Up Corp., supra*, 209 NLRB at 195) thereby adopting the predecessor's collective bargaining agreement. Any unfair labor practices which were alleged occurred after the establishment of the new wages, hours and working conditions. Accordingly, the Petition should be granted so that the erroneous decision of the court below may be reversed.

III. ABSENT REVIEW BY THIS COURT, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON CAPITAL INVESTMENT IN FAILING COMPANIES.

As a consequence of the decision below, successor employers will have no way of knowing whether an announced intention to hire employees under new employment terms will be retroactively reversed in an unfair labor practice proceeding, at substantial cost. In addition, because of the conflict in the circuits with regard to the proper application of this Court's *Burns* decision, potential purchasers will lack the guidance necessary to make significant capital investments.

NAM believes that the five dissenters have accurately described the likely effects of the Seventh Circuit's decision to uphold the Board, absent review and reversal by this Court:

> [T]he Board's pretense of "remedy" has produced an order that may make profitable production impossible. By approving this masquerade we preserve featherbedding, increase the risks of taking over foundering firms, and frustrate the revival of aging plants. Neither American workers nor American consumers will welcome this consequence.

(App. 60a)

NAM strongly urges the Court to correct the mistaken views expressed in the decision below, in order to prevent an unwarranted, crippling effect on our nation's already troubled economy. The clear conflict in the circuits, the

erroneous nature of the Seventh Circuit's decision and the importance of the issue to industry as a whole all support the granting of the writ.

CONCLUSION

The decision of the Seventh Circuit is in direct conflict with four other Circuit Courts of Appeals. The question of the obligation of a successor either to adopt the terms and conditions of a predecessor's collective bargaining agreement or initiate its own new terms and conditions of employment must be resolved. The remedies applied by the NLRB and the Seventh Circuit must be considered a penalty, since the true reestablishment of the *status quo ante* under the conditions in this case would not require Petitioners, under the *Burns* doctrine, to adopt the terms and conditions of the predecessor's collective bargaining agreement. The Court should grant the Petition for Writ of Certiorari in order to clarify and insure proper application of the *Burns* doctrine.

Respectfully submitted,

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